

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/26/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 2001-000247

FILED: _____

STATE OF ARIZONA

LISA B BARNES

v.

D'ANNA LYNN DEPASCAL

KRISTEN M CURRY

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

RULING/AFFIRM/REMAND

PHOENIX CITY COURT

Cit. No. 5853086

Charge: 1. DUI OR APC
2. DUI W/AC OF .10 OR HIGHER

DOB: 01-27-1968

DOC: 08-03-2000

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court and the memoranda submitted by counsel.

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Appellant alleges the trial court erred in denying her Motion to Suppress the breath test taken prior to her arrest. Appellant states that the breath test should not have been admitted because the machine used to conduct the test was returned to the manufacturer for repairs several weeks after her test was administered. The evidence, Appellant believes, is insufficient to allow a determination of whether or not her test was valid and therefore, due to its prejudicial nature, it should be suppressed.

Appellee points out, and Appellant agrees, that the machine in question was working properly during diagnostic tests conducted before and after Appellant's test was performed. Appellee contends that the machine was returned to the manufacturer to repair a problem with the printer and for preventative maintenance only, neither of which would affect the machine's accuracy. Both parties have agreed that the first four requirements of A.R.S. § 28-1323(A) had been met. The only question of statutory compliance concerns the fifth element of the statutory test--whether the machine was working properly.¹ Alternatively, Appellee believes that the test is properly admissible because Appellee's expert provided a foundational showing that the test was accurate according to generally accepted standards as required by *State ex rel. Collins v. Seidel* (real party Deason).²

At a hearing on April 11, 2001, at which experts for both parties testified regarding the validity of the test, the trial court denied Appellant's Motion to Suppress. The court then proceeded to a determination of guilt and found Appellant guilty of driving under the influence of alcohol³ and of having an alcohol concentration of .10 or greater within two hours of driving.⁴

¹ ARIZ. REV. STAT. § 28-1323(A)(5).

² 142 Ariz. 587, 691 P.2d 678 (1984).

³ ARIZ. REV. STAT. § 28-1381(A)(1).

⁴ ARIZ. REV. STAT. § 28-1381(A)(2).

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During the hearing on the Motion to Suppress, Appellant failed to object to the testimony of Appellee's expert other than in one instance. This objection was made when Appellee asked the expert if the work on the machine, excluding the printer repairs, appeared to be preventive maintenance.⁵ Appellant did not object to the remainder of the expert's testimony, including the expert's assertion that the test would be accepted in the relevant scientific community.⁶ A party's failure to object to a line of questioning constitutes a waiver of that issue upon appeal.⁷

An appellate court should address an issue previously waived only where there are serious defects in the trial proceedings that would substantially affect the Appellant's constitutional rights, and then only in order to prevent a miscarriage of justice.⁸ The trial court's decision to deny the Motion to Suppress and to admit the intoxilyzer results does not fall into this category. The trial court gave Appellant sufficient opportunity to present her case. Based upon the record of the Motion to Suppress hearing and subsequent sentencing, Appellant has no claim that these proceedings violated her due process rights or were fundamentally unfair. Additionally, apart from the intoxilyzer test, the record in this case contains significant evidence, including Appellant's own statements at her arrest,⁹ indicative of her guilt. As a result, the trial court's decision to deny the Motion to Suppress does not constitute a miscarriage of justice.

Even if this Court were to ignore Appellant's failure to make a timely objection to the testimony of Appellee's expert, the trial court's decision must stand. A trial court's ruling on a Motion to Suppress must be reviewed under the standard of

⁵ R.T. of April 11, 2001 at p. 36, ll. 11-14.

⁶ *Id.* at p. 42, ll. 6-11.

⁷ *State v. Gilreath*, 107 Ariz. 318, 319, 487 P.2d 385, 386 (1971).

⁸ *Id.*

⁹ See R.T. of April 11, 2001 at p. 80, ll. 8-9.

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abuse of discretion¹⁰ and the evidence must be reviewed in the light most favorable to upholding the trial court's decision.¹¹ As Appellant notes in her memorandum, the trial judge expressed some concern about the number of assumptions made by Appellee's criminalist prior to ruling on the Motion to Suppress.¹² She stated, however, that this was a classic "battle of the experts" and, in ruling for Appellee on the motion, chose to believe Appellee's expert over that of Appellant's.¹³ The trial judge expressed this more clearly at sentencing, when she ruled that she did not feel the results of Appellant's intoxilyzer test were sufficiently problematic that she had reasonable doubt concerning their veracity.¹⁴

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings.

¹⁰ *State v. McKinney*, 185 Ariz. 567, 577, 917 P.2d 1214, 1224 (1996).

¹¹ *Id.*

¹² R.T. of April 11, 2001 at p. 70, ll. 20-23.

¹³ *Id.* at p. 70, l. 24.

¹⁴ *Id.* at p. 82, ll. 19-21.